



## Arizona's Supreme Court Rules Christian Calligraphers Can't Be Forced to Make Gay Wedding Invitations

Scott Shackford

September 17, 2019

Calligraphy is a form of expressive speech, and therefore the city of Phoenix cannot compel a local studio to create wedding invitations for same-sex couples, Arizona's highest court ruled yesterday.

The Arizona Supreme Court determined, 4-3, that any attempt to use Phoenix's ordinances to punish Breanna Koski and Joanna Duka of Brush & Nib Studio for refusing to create custom wedding invitations for gay couples who were getting married violated both the state's constitution and its Free Exercise of Religion Act.

The contours of *Brush & Nib Studio v. City of Phoenix* are similar to others we've seen about whether bakers or florists could be forced under anti-discrimination laws to provide their goods and services to same-sex couples even if they have religious objections to recognizing or celebrating these weddings. Is the baking of a wedding cake or the arranging of flowers an expressive act and, therefore, protected speech?

In this case, the judges were assisted by the fact that the product that Brush & Nib provides is unambiguously a form of speech. The company prepares custom invitations requesting the recipients to celebrate and honor the couple's pending nuptials. They're explicitly describing how awesome it is that the couple is getting married. So if they have a religious opposition to recognizing and celebrating such marriages, then they're being forced to craft a message that compromises their beliefs.

That's just not acceptable, the justices ruled. Justice Andrew Gould wrote the court's opinion, heavily laden with references to previous state and federal court precedents on issues of compelled speech and commerce. The decision notes that not all business activity includes expressive speech, but that tattoos parlors and video game companies, for example, sell services and products that have been ruled to be protected free speech: "A business does not forfeit the protections of the First Amendment because it sells its speech for profit." While not all that Brush & Nib does falls under First Amendment protections, their custom invitations do:

Each custom invitation created by Duka and Koski contains their hand-drawn words, images, and calligraphy, as well as their hand-painted images and original artwork. Additionally, Duka and Koski are intimately connected with the words and artwork contained in their invitations....For each invitation, Duka and Koski spend many hours designing and painting custom paintings, writing words and phrases, and drawing images and calligraphy. Moreover,

they insist on retaining artistic control over the ideas and messages contained in the invitations to ensure they are consistent with their religious beliefs.

The justices determine that these invitations are much like that of the tattoo artist, and therefore Duka and Koski cannot be forced to make custom invitations for same-sex couples.

Note the emphasis on "custom." The ruling is also very clear that the shop cannot just turn away gay people or couples who want to purchase other goods or services from Brush & Nib—they do not have blanket permission to discriminate against gay customers.

Representatives for the city said they're looking for possible grounds to appeal. This might be difficult because, though the ruling repeatedly invokes the First Amendment and Supreme Court precedents, it's actually based on the state's constitution and state statutes, not federal law.

Eugene Volokh and Dale Carpenter, contributors to *The Volokh Conspiracy* hosted here at *Reason*, partnered with the Cato Institute to submit an amicus brief in support of Brush & Nib's right to refuse to provide custom wedding invitations to gay couples. Volokh and Carpenter took the opposite position as Cato (and the Reason Foundation, which publishes this site) in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Supreme Court case from 2018 that focused on whether bakers could be forced to make a wedding cake for a same sex couple. For those who missed that case, the court ultimately dodged the issue, ruling 7-2 that the Colorado Civil Rights Commission failed to serve as a neutral arbiter in the case and its members expressed religious animosity when making its decision. The justices declined to determine whether or not the creation of a wedding cake was a form of expressive speech protected by the First Amendment. Volokh explained why he disagreed with Cato and the Reason Foundation's position a year ago in our magazine.

Last night, Carpenter weighed in on yesterday's ruling at *The Volokh Conspiracy*:

Along with a million or so other Americans, I am in one of those marriages the calligraphers condemn. Free speech used effectively by gay-marriage advocates convinced large majorities of Americans to support the cause. Those supporters can criticize the calligraphers on theological, philosophical, and political grounds. And of course, they can readily (and, I assume, happily) take their business elsewhere. But those whose very calling is to put pen to paper should not be required—on pain of government-imposed fine, jail, or loss of their livelihoods—to speak in violation of their consciences.